

May 11, 1999

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In the Matter of: \*  
\*  
Matthew A. Newgarden \*  
Claimant \*  
\*  
v. \*  
\* Case No. 1998-LHC-2093  
General Dynamics Corporation \*  
Employer/Self-Insurer \*  
\* OWCP No. 1-139366  
and \*  
\*  
Director, Office of Workers' \*  
Compensation Programs, United \*  
States Department of Labor \*  
Party-in-Interest \*  
\*\*\*\*\*

Appearances:

Matthew Shafner, Esq.  
For the Claimant

John W. Greiner, Esq.  
For the Employer/Self-Insurer

Merle D. Hyman, Esq.  
Senior Trial Attorney  
For the Director

Before: **DAVID W. DI NARDI**  
Administrative Law Judge

**DECISION AND ORDER - DENYING BENEFITS**

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on November 20, 1998 in New London, Connecticut at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an

Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

**Post-hearing evidence has been admitted as:**

<b>Exhibit No.</b>	<b>Item</b>	<b>Filing Date</b>
CX 24A	Deposition Notice relating to Peter Baker	12/07/98
CX 24B	Deposition Notice relating to Ralph Perry	12/07/98
CX 24C	Attorney Shafner's letter filing the	12/28/99
CX 25	December 11, 1998 Deposition Testimony of Ralph Perry, as well as the	12/28/98
CX 26	December 11, 1998 Deposition Testimony of Peter Baker	12/28/98
RX 24	Attorney Greiner's letter requesting a short extension of time for the parties to file their post-hearing briefs	01/25/99
ALJ EX 12	This Court's <b>ORDER</b> granting the requested extension	01/25/99
CX 27	Attorney Stone's letter suggesting that briefs be filed on March 30, 1999	02/12/99
ALJ EX 13	This Court's <b>ORDER</b> granting the request	02/16/99
CX 28	Claimant's brief	03/29/99
ALJ EX 14	This Court's <b>ORDER</b> giving Claimant seven (7) days to file a response to the Employer's untimely filed brief	04/15/99
RX 25	Employer's brief	04/19/99

The record was closed on April 19, 1999 as no further

documents were filed.

### **Stipulations and Issues**

#### **The parties stipulate, and I find:**

1. Claimant and the Employer were in an employee-employer relationship at the relevant times.

2. Claimant alleges that he suffered an injury on December 13, 1996 in the course and scope of his employment.

3. Claimant gave the Employer notice of the injury in a timely manner.

4. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

5. The parties attended an informal conference on December 17, 1997.

6. The applicable average weekly wage is in dispute.

7. The Employer has paid no benefits under the Act.

#### **The unresolved issues in this proceeding are:**

1. Whether Claimant is a covered maritime employee under the Longshore Act.

2. Whether Claimant's injury arose out of and in the course of his maritime employment.

3. If so, whether he is entitled to compensation benefits from December 14, 1996 through February 26, 1997.

4. Claimant's entitlement to medical benefits for his work-related injury.

5. Claimant's average weekly wage.

### **Summary of the Evidence**

Matthew A. Newgarden ("Claimant" herein), with a high school education completed in 1980, obtained his Bachelor of Science degree with high honors in October of 1988 from Charter Oak College through a program whereby a student earns college credits on the basis of the tests taken, and enlisted thereafter shortly in the

U.S. Navy; however, he was given "an honorable discharge" on October 1, 1980, after three weeks, because he apparently was "(u)nadaptable to military service." He then went to work for a supermarket in Baldwin, New York and on April 6, 1981 he began work as a laborer at the Groton, Connecticut shipyard of the Electric Boat Company ("Employer"), then a division of the General Dynamics Corporation, a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. As a laborer, Claimant was first assigned duties of cleaning and vacuuming the "large barge," identified as "the IEX-504," which was used by the Employer as a floating office building as it was permanently berthed upon the Thames River at the shipyard. He cleaned the hallways and offices so that those engaged in the construction of the boats could safely and efficiently perform their duties. He worked on that floating barge for about a year and he was then transferred to work in "the electricians' office area" where the electricians and the planners were engaged in performing their assigned duties in the shipbuilding industry. Claimant's duties, involved, **inter alia**, sweeping and mopping floors, emptying waste baskets, vacuuming different areas, removing debris and "garbage along the floor." He worked in that "pretty big area" for about one year and, while still remaining in Department 505, he was "moved back to that barge" for about six months and he again performed his similar duties as a laborer. Claimant was then on a leave of absence from December of 1983 to March of 1985 because of an emotional disturbance, **i.e.**, obsessive compulsive disorder, and his treatment records at The Institute of Living are in evidence as CX 2. (RX 5, RX 16 at 2-7; TR 76-83)

Claimant was released to return to work by his doctors and he returned to the shipyard on March 3, 1985 as a laborer and he resumed the duties he formerly performed, and this time he was assigned to the Employer's purchasing department where he had duties of "(m)opping, vacuuming, (removing) garbage from March of '85 (to) probably around October of '85." He was then transferred to second shift and he worked "mainly outside until the strike of (July of) '88." His work areas included the so-called 260 Building--a large building almost twice the size of a football field--where the submarine is fabricated in sections just prior to launching and subsequent commissioning. He again swept the floors, removed debris and garbage, shovelled snow as needed, etc. in work areas near the building ways. The strike occurred on July 1, 1988 and Claimant, joining in the strike, went to work elsewhere at several department stores as a combination cashier/stock clerk. He was recalled to work as a laborer at the shipyard on November 3, 1991 and he was restored to his prior seniority level, pursuant to the settlement resolving the union dispute. Claimant denied any

attempts to injure himself in the past and he admitted receiving two warnings relating to disciplinary proceedings for violating company policy. The first was in 1987 and involved leaving his work area ten (10) minutes early prior to the normal quitting time and the second warning was received in February of 1997. (RX 16 at 7-12; TR 83-84, 91-92)

In March of 1995 Claimant was assigned to clean the bathrooms of the machine shop and elsewhere and he is familiar with the storage room on the second floor of the machine shop. According to Claimant, the room is used as "a locker room and (for) storing maintenance supplies." Claimant had a locker in that room where he stored a old pair of backup boots which he used during a snow storm or other inclement weather, as well as perhaps a pair of old gloves. That storage room also contained cleaning supplies such as brooms, plastic garbage bags, cleaning fluid, etc. Those cleaning supplies were stored as a convenience to more efficiently clean the areas on the second floor and Claimant would replenish those supplies whenever the cleaning supplies would run low. He would use that room once a day the "first thing in the morning" after he "punched-in" at the time clock and he would get the supplies he would need to clean the men's bathrooms in the machine shop, on the wet dock, the so-called "Big Bertha," a "very large men's bathroom" on the YTT barge, and in other buildings. After entering or leaving that storage room Claimant routinely closed the door to prevent thefts of those supplies. While he "was not aware" that that door had a habit of sticking, he did testify that the "lock had never worked on that door . . . even from the outside." According to Claimant, there was a window next to the door in the supply room but "it was covered with cardboard" to prevent others from seeing the supplies and from being tempted to remove them without permission. The window was "a solid piece of glass" and "doesn't open." The top part of the window was actually "wire mesh." (RX 16 at 12-20, RX 5; TR 85-87)

Above the storage room is a so-called loft to which one gains access by "climb(ing) up on one of the lockers" and using the shelves at the left side as a make-shift ladder. He went into the loft just one time and that was on December 13, 1996, at about 8 AM, after he had clocked in at 7 AM and had spent about twenty minutes or so inspecting the condition of "Big Bertha" and to determine what supplies he would need to clean that bathroom. That loft area contained "a bunch of maintenance equipment," as well as some cardboard boxes that he would use later as the need arose. According to Claimant, "everything up there looked like junk to me. It was very dirty" and "if there was a television, (he) doubt(ed) it would work." Claimant did not know if that alcove contained any sort of bedding material, Claimant remarking that he did not know who "would sleep there" as there is no heat in that room and "it

was cold in that room" on December 13, 1996. He was not aware that that loft contained any magazines or other reading material but, according to Claimant, "There were magazines buried . . . in some of the lockers in newspapers." (RX 16 at 20-23)

On December 13, 1996 Claimant had to climb up into the loft "(b)ecause (he) was locked in from the inside." He had gone into the room "to get supplies and (he) got locked in from the inside." Claimant pulled back the cardboard from the window and he banged and kicked on the door to attract the attention of his co-workers on the second floor. However, no one could hear him due to the loud noises made by the operation of those "very loud" machines and the other equipment in that building. He "was trying to open the door frantically," his "hands were cut open and bleeding," he "was making a lot of noise, kicking the door" but no one heard him. Claimant then panicked and, in a moment of desperation, after spending about twenty to thirty minutes in a state of panic, went up to the loft and he "tried to climb out on the ledge to one of the adjoining adjacent windows which (he) saw were open." He looked below and across to the balcony, saw no one and he stepped on the ledge to try to reenter the building through that adjacent window. However, the ledge was not wide enough to accommodate his work boots (CX 18) and he realized that the ledge was "more precarious" than he had anticipated and, as he was unable to retrace his steps, he "jumped and landed as well as (he) could." Claimant, acknowledging that he "did a stupid thing," fell about fifteen (15) feet to the pavement, and he "got up and walked about 30, 35 feet," before collapsing in back of a nearby dumpster. Claimant attributed his actions to the fact that he "was frantic since the door was locked from the inside." (TR 96-107)

Some people came up to Claimant while he was on the ground and he was not told to move and to await the arrival of the paramedics. He did not recall telling anyone that he had fallen down 25 steps. Later on Claimant did tell those who asked him that he had jumped from the ledge because he "got locked from the inside and (he) tried to get to another window." Claimant did admit to being fearful that he would be caught in the storage room by a supervisor because in October of 1995 a Mr. Guilands had caught him taking an early break in that room, and Claimant had received an oral warning for that incident. Claimant who apparently has a "fetish" for having clean hands and who often washes his hands as much as twelve (12) times each day (TR 94) was in the habit of using the ladies' room--when there was no one in there--to wash his hands because the warm water would prevent chapping of his hands, remarking there was no warm water in the men's room. He would not enter the ladies' room when occupied and he would immediately leave when he heard someone entering that room. About one month earlier a woman had complained about Claimant being in there and a sign was placed on

the door limiting it to "ladies only," and after that point he no longer entered that room. The "bedding" referred to by the Employer actually was an orange colored cushion covered with plastic. Claimant spent about 20 to 25 minutes in the storage room before going up into the loft and he spent about a total of five minutes in the loft and out on the ledge. (RX 16 at 23-39; TR 107-111)

The paramedics arrived at the scene and Claimant, after being boarded and collared, was brought to the Emergency Room at Lawrence and Memorial Hospital (CX 4) and, in view of its importance herein, the December 13, 1996 Emergency Room report of Dr. Susan P. Mathew will be included at this point (RX 10):

"CHIEF COMPLAINT: Back pain after fall.

"HISTORY: The patient is a 34 year old who fell down a flight of stairs. He was brought to the emergency room by ambulance for evaluation. The patient complains of left wrist pain and lower back pain. The patient was up from the scene and was walking into the building to get help and collapsed to the floor. The patient denies any other symptoms. He denies any loss of consciousness and denies any head or neck pain.

"EXAMINATION: The patient was brought in boarded and collared. After initial evaluation, the collar was removed. The patient was examined. Pulse is 66, respiratory rate is 20, blood pressure is 109/58, temperature is 38.3.

"HENT exam - unremarkable.

Heart - regular rate and rhythm.

Lungs - clear.

Abdomen - soft and nontender.

Extremities - left wrist area has some bruising noted. The palm of left hand also has some bruising and abrasions noted. Range of motion of the wrist is normal. No significant swelling of the wrist.

Back - there is tenderness to palpation in the mid lumbar area.

"COURSE: The patient was given Toradol 60 mg IM. He had lumbosacral spine and left wrist films done. Lumbosacral spine shows L1/L2 compression fracture. The left wrist has no fractures seen. The patient was referred to Dr. Thompson, who was the orthopedist on call, for further management. The plan is to admit the patient to the hospital mainly for pain control and bedrest. Further treatment is as per Dr. Thompson."

Dr. Eric N. Thompson states as follows in his December 13, 1996 admission report (RX 11):

ADMITTING DIAGNOSIS: Compression fracture L1, L2.

This 34-year-old man says he lost his balance and fell headlong down a long flight of stairs this morning at work at Electric Boat. He believes he tumbled as he fell and essentially sat down hard on the concrete at the bottom of the flight. He staggered a few steps out the door and then collapsed and was unable to walk. He was brought to the emergency room complaining of severe low back pain and was found to have compression fractures of L1 and L2. He is admitted for pain control and bed rest.

He says he is in good general health. He has no allergies. He takes no regular medication. He has in the past been treated for "athlete's foot" both with oral and topical medication, neither of which he takes any longer.

PHYSICAL EXAM: Reveals an obviously uncomfortable young man who is alert, oriented and cooperative. He is complaining of severe low back pain.

HEEN - within normal limits.

Chest - clear to auscultation.

Heart - regular rhythm, no murmur.

Abdomen - soft, flat, no masses or tenderness.

Extremities - no deformity. Complains of back pain with active or passive hip flexion. Has paravertebral muscle spasm when he is log rolled to the side. There is some tenderness over the upper lumbar spinous processes.

Neurologic - normal with active deep tendon reflexes.

Skin - scaly dermatitis around toes of both feet with long, untended toenails.

He is admitted for observation and bed rest and analgesia. I have advised him there is always a concern about paralytic ileus for this type of fracture and will keep him on a liquid diet for a day or two. I would plan to brace him to assist early ambulation, but his fractures involve anterior column only and less than 50% of the height of the anterior vertebra. I suspect this injury is stable and will not require instrumentation and has a good prognosis, according to the doctor.

Claimant was discharged on December 17, 1996 and Dr. Thompson's report is as follows (RX 13):

"DISCHARGE DIAGNOSIS:	<ol style="list-style-type: none"><li>1. Compression fracture L1 and L2 vertebrae.</li><li>2. Fracture of left radial head.</li><li>3. Fracture of coronoid process left ulna.</li><li>4. Sprain of left wrist and right</li></ol>
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knee.

This 34-year-old man was brought to the Emergency Room by ambulance on the day of admission giving a story of having lost his balance and tumbled headlong down a flight of stairs this morning at work at Electric Boat. He feels he landed hard on his buttocks at the bottom of the flight of stairs. He claimed he staggered a few steps out the door, collapsed and was unable to walk. He was found in the Emergency Room to have compression fractures of L1 and L2 and was admitted for pain control and bed rest.

"PAST MEDICAL HISTORY: Showed that he claimed to be in good general health, had no allergies and took no regular medications. He says that he has been treated in the past for athlete's foot with oral and topical medication.

"HOSPITAL COURSE: Later on the day of admission the Medical Department of Electric Boat called to advise that Mr. Newgarden had an extensive psychiatric history and it was their suspicion that he jumped or fell from a window. The concern was raised about suicidal intent and though he denied this specifically, we asked Crisis Intervention to see him. They were able to elicit the history that indeed he had fallen and gave an involved story about being locked in a store room, climbing out a window, crawling along a ledge and falling. He claims that he did not give an accurate history because he feared that he would lose his job. It turns out that he has about a 13-year history of obsessive-compulsive disorder and in he meantime has taken a variety of psychotropic medications and has been seen by quite a significant number of mental health professionals. He continued to swear that he was not suicidal so the suicide watch was removed. Because of complaints of elbow pain radiographs were taken on the second hospital day and he was found to have an undisplaced fracture of the left radial head and of the coronoid process of the ulna. He was comfortable in a sling at that point and was tolerating sitting on the edge of the bed. By the fourth hospital day he was up with a walker and back pain was improving. The next day he decided that he could function at his parents' home considering he was only on oral medication and navigating his sling regularly and did not feel that he required any further protection for his arm. He still of course complained of mid-backache which was steadily improving. He was discharged home with Percocet for pain, instructions to apply ice and begin gentle range of motion exercises to the elbow. Arrangements were made to see him in the office in about ten days though he was advised that he could call sooner if problems arose. It was my judgement that this should be considered a bona fide work-related injury as there is no persuasive evidence that the injury occurred in an attempt to do himself harm. No surgery is anticipated on the elbow or spine.

(See also CX 5, CX 6, CX 7)

Andrew Moran, LCSW, evaluated Claimant and, after receiving an accurate history report of what had happened, as well as a report of frequent use of NO-DOZE as a stimulant, concluded that Claimant "is alert, fully oriented and cooperative," was not suicidal and should "seek individual therapy on an outpatient basis" for his obsessive compulsive disorder and his work-related stressors and social environs mental stressors. (RX 12)

Dr. Thompson kept Claimant out of work and the doctor released him to return to work on February 27, 1997 at his regular job as he has recovered from his back, knee and elbow injuries. (RX 14, RX 15; CX 8) Claimant took the doctor's return to work slip to the Employer's Yard Hospital but he was not allowed to return to work because he was told that he would be facing disciplinary proceedings because he was told that the loft contained a television set or computer monitor, some pornographic magazines and a bed made out of cushions, the Employer's security department personnel concluding that Claimant had been using the loft as a private rest area. (CX 9) Furthermore, on-duty personnel at the hospital did not have enough information to determine if Claimant psychologically was able to return to work and that it might be necessary to followup with Dr. Ruffner. (CX 10) Claimant was suspended and he was told to either resign or be fired; he decided to resign because he wanted to be able to find employment elsewhere, although he was advised by the union that his situation was a "winnable" grievance. (TR 111-112)

Mrs. Elaine Newgarden, Claimant's mother, testified that her son's obsessive compulsive disorder ("OCD") was diagnosed at the Institute of Living (CX 2), although he has had that condition since he was at teenager. He was also treated at the Institute for depression and she denied that her son is suicidal, although the doctors at L&M suspected that he might be, based upon his conflicting stories as to the etiology of his injuries on December 13, 1996. After his fall Claimant was diagnosed with asperga syndrome, a form of high functioning autism although without the complete symptoms of a child with autism. A person with this syndrome is unable to form relationships and the intelligence level of such a person can range from being retarded to being highly intelligent. Claimant is being retrained for work in the computer industry through the Bureau of Rehab Services, a program funded by the State of Connecticut. Claimant's OCD makes him wash his hands numerous times during the day and he has done this for many years. He is "very concerned" with cleanliness and will usually wash his hands after touching anything. There is no medication for that condition. (TR 67-75)

Claimant has obtained employment as a maintenance person or stock clerk at Marshall's Department Store and his wages are in evidence as CX 21 and CX 22. (TR 112-113) In this proceeding, Claimant seeks to establish his status as a maritime employee and he seeks benefits for his temporary total disability from December 14, 1996 through February 26, 1997. There is no pending claim for a loss of wage-earning capacity. (TR 17-32)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible witnesses, except as noted below, I make the following:

### **Findings of Fact and Conclusions of Law**

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, *supra*, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in

the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita, supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier, supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

As already noted, to establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove

that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See, e.g., Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See, e.g., Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I accept both contentions in my decision herein although I am cognizant that the Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, while I may properly rely on Claimant's statements to establish that he experienced a work-related harm, it is undisputed that an accident occurred which could have caused the harm, but this case centers around the circumstances and etiology of that accident. **See, e.g., Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. §920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in

contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole." **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied**, 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to Employer to rebut the presumption with substantial evidence which establishes that Claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied**, 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John**

**T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a Claimant's employment is sufficient to rebut the presumption. See **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an Employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, see **Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant also alleges that the harm to his bodily frame, **i.e.**, his orthopedic injuries, resulted from his December 13, 1996 fall at the Employer's facility. The Employer has introduced specific and comprehensive evidence severing the connection between such harm and Claimant's maritime employment. The presumption falls out of the case and I shall weigh and evaluate the evidence. Thus, Claimant has not established a **prima facie** claim that such harm is a work-related injury, as shall be discussed below.

However, before I determine whether or not Claimant's orthopedic injuries arose out of and in the course of his employment, I must first resolve the issue as to whether or not Claimant's work as laborer at the Employer's shipyard satisfies the status and situs requirements of the Longshore Act as the Employer submits that Claimant is not subject to the jurisdiction of the Act because of the nature of his work.

The Benefits Review Board has consistently held that the Section 20(a) presumption that a claim comes within the provisions of the Act is inapplicable to the threshold issue of jurisdiction. **Sedmak v. Perini North River Associates**, 9 BRBS 378 (1978); **aff'd sub. nom. Fusco v. Perini North River Associates**, 601 F.2d 659 (2d Cir. 1979), **cert. granted, vacated and remanded**, 444 U.S. 1028 (1980), 622 F.2d 1111 (2d Cir. 1980) (**decision on remand**); **Wynn v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 31 (1983); **Boughman v. Boise Cascade Corporation**, 14 BRBS 173 (1981); **Holmes v. Seafood Specialist Boat Works**, 14 BRBS 141 (1981). However, the United States Court of Appeals for the Fifth Circuit has held that "(t)he judicial policy has long been to resolve all doubts in favor of the employee and his family and to construe the Act in favor of

the employee for whose benefits it is primarily intended," **Army Air Force Exchange v. Greenwood**, 585 F.2d 791 (5th Cir. 1978), and that the policy of the Act has been "to resolve doubtful questions of coverage in the Claimant's favor." **Tampa Ship Repair v. Director**, 535 F.2d 936, 938 (5th Cir. 1976).

Although pre-amendment case law serves as useful framework in which to ascertain maritime employment, it is not controlling. **Wright v. Traylor - Johnson Construction Co.**, 9 BRBS 372 (1978). However, the U.S. Supreme Court has held that injury over navigable waters in and of itself is a sufficient benchmark by which to ascertain maritime employment. **Director v. Perini North River Associates**, 459 U.S. 297 (1983). Thus, employment or injury over actual navigable waters is now dispositive in determining maritime employment under Section 2(3). However, as this Employee was not injured over navigable waters, it is necessary to consider whether he was engaged in maritime employment. In this case, his duties as a labor initially cannot be characterized as those of a longshoreman, or of longshoring activity, a ship repairman, shipbuilder, or ship-breaker or a harbor worker under the rule enunciated by the Benefits Review Board in **Stewart v. Brown & Root, Inc.**, 7 BRBS 356 (1978), **aff'd sub. nom. Brown & Root, Inc. v. Stewart**, 607 F.2d 1087 (4th Cir. 1979).

The aforementioned **Sedmak** test for status requires a determination of whether Claimant's work had a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters.

On the basis of the totality of the record and having in mind the beneficent purposes of the Act and the remedial nature of that legislation, I hold that Claimant's work does satisfy the **Sedmak** test. Clearly, his work bears a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters as I find that his duties constituted an integral part of the shipbuilding process, as further discussed below.

### Coverage

Generally, an employee is covered by the Act if he meets two tests: the status test and the situs test. **See generally Northeast Marine Terminal Co. v. Caputo**, 432 U.S. 249 (1977). An employee who would have been covered under the pre-Amendment Act, **i.e.**, who was injured over water, is covered by the amended Act, without reference to the status test. **See Director v. Perini North River Associates**, 459 U.S. 297, 103 S.Ct. 634 (1983). Claimant was not injured over water, and therefore must meet both the status

test and the situs test.

The situs test refers to the place at which the employee worked or was injured. Covered locations include navigable waters and adjoining areas used to load, unload, repair or build a vessel. **See** Section 2(4) of the Act. Claimant's work at the Employer's shipyard does satisfy the situs test, because his most recent employment occurred in the Employer's main yard which adjoins navigable waters and which is used for ship building and repair. Claimant therefore meets the situs test based upon this employment.

The status test refers to the employee's occupation. Covered occupations include longshoremen, harbor-workers, ship repairers and shipbuilders. **See** Section 2(3) of the Act.

Claimant's coverage by the Act during his recent employment as a laborer is subject to considerable controversy. The general rule is that employees are covered if their duties are an "integral part" of traditional longshoring and shipbuilding or ship repairing processes. The Supreme Court has concluded that, at a minimum, clerical workers are not covered by the Act. The Court explained the Congressional intent was to cover those workers engaged in the essential elements of unloading a vessel, taking cargo out of a hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area. [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Excluded are employees who perform purely clerical tasks and are not engaged in the handling of cargo. **Northeast Marine Terminal Co. v. Caputo**, 434 U.S. 249, 266-67 (1977). The **Caputo** Court relied upon the following passage from the legislative history:

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in loading

and unloading functions are covered by the new amendment. S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13, 1972 U.S. Code Cong & Admin. News 4708.

The Fourth Circuit Court of Appeals has addressed the status issue in a case somewhat similar to the case **sub judice**. The court concluded that a warehouseman whose duties included loading and unloading pipe, color-coding pipe, verifying the proper shipment of pipe, and occasionally sawing the pipe to appropriate lengths was covered by the Act. **White v. Newport News Shipbuilding & Dry Dock**, 633 F.2d 1070 (4th Cir. 1980). The court held, first, that the inclusion of clerical duties in the claimant's job was not decisive of his status. Second, the court stated that the claimant's primary duties were not clerical. The only clerical duties were those involving verification of proper shipment of pipe. Third, the union's classification of the job as clerical was not decisive of the claimant's status. Instead, the court held that the appropriate test was whether the claimant's primary duties "constituted an 'integral part' and necessary 'ingredient' of shipbuilding and also caused him to be directly involved therein . . . ." **White, supra** at 1074. Since that claimant's duties were "the first steps taken physically to alter that pipe for its use in ship construction," he met the status test. (**Id.**)

Claimant's duties as a laborer also establish coverage by the Act as an integral part of the shipbuilding process. I therefore conclude that Claimant was a maritime employee covered by the Act, as more fully discussed below.

The Benefits Review Board has discussed the so-called "support services" test in a number of cases and, most recently in a matter over which this Administrative Law Judge presided, the Board reversed a denial of benefits to a laborer who worked only in the adjoining areas and who was prohibited by union rules from performing any work on the boats or barges or any other structure floating upon or berthed on the Pascagoula River and the Gulf of Mexico, the Employer believing that this restriction would insulate it from claims under the Act for this class of workers as **work on the boats and vessels was performed by employees from another union class of workers**. In **Joseph E. Biggs v. Ingalls Shipbuilding**, BRB Nos. 95-2183 and 95-2183A, August 14, 1996, the Board held as follows in its non-published **ORDER** at 1-3:

"The Director and claimant appeal the administrative law judge's finding that claimant does not satisfy the status test of Section 2(3) of the Act. 33 U.S.C. §902(3). (Footnote omitted) In addition, the Director has filed a motion for summary reversal.

For the reasons that follow, we grant the Director's motion, reverse the administrative law judge's finding that claimant does not satisfy the status element, and remand the case for a decision on the merits.

"The facts recited by the administrative law judge are uncontested and are as follows: Claimant was employed as a ground laborer at Ingalls Shipbuilding at its shipyard adjacent to navigable waters. His duties included cleaning and removing debris from the property, and he used shovels, wheelbarrows, rakes and brooms to perform his job. Claimant testified that he cleaned and swept various shops, occasionally having to move equipment to do so. Claimant also had to keep gantry tracks clear so that prefabricated sections of vessels could be moved. Claimant did not work aboard ships. On January 22, 1991, claimant injured his back while attempting to move some cables.

"The administrative law judge found that claimant did not satisfy the status test because he was a land-based, not a ship-based, cleaner, whose

duties are similar to those performed not only on non-maritime construction sites but also in every building, retail establishment and virtually every commercial enterprise. Claimant did not face the hazards normally associated with shipbuilding, unlike those workers who are actively engaged in the building, repair or overhauling of vessels.

Decision and Order at 11. The administrative law judge also cited the Supreme Court's decision in **Chesapeake & Ohio Ry. Co. v. Schwalb**, 493 U.S. 40, 23 BRBS 96 (CRT)(1989), for the proposition that claimant is not covered because his work is not "an integral or essential part of loading or unloading a vessel." **Id.**

"We hold that the administrative law judge erred in finding that claimant was not engaged in covered employment, as his reasoning is essentially that of the discredited "support services" test. **See Graziano v. General Dynamics Corp.**, 663 F.2d 340, 342-343, 14 BRBS 52, 56 (1st Cir. 1981)(claimant who repairs and maintains the structures housing shipyard machinery and the machinery itself is covered under the Act); **see also White v. Newport News Shipbuilding and Dry Dock Co.**, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980); **Jackson v. Atlantic Container Corp.**, 15 BRBS 473 (1989). Thus, the fact that claimant's duties in this case are the type performed in other businesses is not dispositive of the coverage issue. In fact, in **Hullingshorst Industries, Inc. v. Carroll**, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), **cert. denied**,

454 U.S. 1163 (1982), the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, deemed it "immaterial" that the skills used by the employee are essentially non-maritime in character if the purpose of the work is maritime. The court stated: "'non-maritime' skills applied to a maritime project **are** maritime for purposes of the 'maritime employment' test of the Act. (Footnote omitted) **Id.**, 650 F.2d at 756, 14 BRBS at 377 (emphasis in original). **Cf. Weyher/Livsey Constructors, Inc. v. Prevetire**, 27 F.3d 985, 28 BRBS 57 (CRT)(4th Cir. 1994), **cert. denied**, \_\_\_ U.S. \_\_\_, 115 S.Ct. 1691 (1995)(holding no coverage for a pipefitter building a power plant on a shipyard as duties were no different than those performed off shipyard premises; construction of power plant is not related to shipbuilding). Claimant's maintenance work at the shipyard entitles him to coverage under the Act. **See Sanders v. Alabama Dry Dock & Shipbuilding Co.**, 841 F.2d 1085, 21 BRBS 18 (CRT)(11th Cir. 1988); **Graziano**, 663 F.2d at 342-343, 14 BRBS at 56; **compare Bazemore v. Hardaway Constructors, Inc.**, 20 BRBS 23 (1987).

"The Supreme Court's decision in **Schwalb** is particularly relevant in this instance. The Supreme Court held that employees injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Thus, railway workers whose work involves repairing and maintaining the machinery used to load coal onto vessels are covered because their work is essential to the loading and unloading process. **Schwalb**, 493 U.S. at 40, 23 BRBS at 96 (CRT). Similarly, in this case, claimant's duties include general maintenance and keeping clean the gantry tracks for the cranes that moved the ship sections from a dry dock to a wet dock. This work therefore is essential to the shipbuilding process, and is covered under the holding in **Schwalb**. **See also Alabama Dry Dock & Shipbuilding Corp. v. Kininess**, 554 F.2d 176, 6 BRBS 229 (5th Cir. 1977), **cert. denied**, 434 U.S. 903 (1977)(claimant covered who sandblasted and disassembled gantry crane before it was used in shipbuilding operation - maintenance of crane necessary to shipbuilding operation).

"Accordingly, the administrative law judge's Decision and Order - Denying Benefits is reversed, as claimant's employment is covered under the Act. (Footnote omitted) The case is remanded to the administrative law judge for disposition of any remaining issues."

In view of that holding of the Board, I find and conclude that Claimant satisfies the status and situs requirements of the Act and I shall now proceed to determine whether Claimant's accident arose out of and in the course of his maritime employment or whether he had deviated from the scope of his employment to bring about that

accident.

This Administrative Law Judge, in resolving that issue, will now summarize the testimony relating to that issue.

## **Injury**

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos, supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

Joan Latina has worked at the Employer's shipyard for twelve (12) years and she currently works in Department 505 (Maintenance). She has worked with the Claimant and she now does the ladies'

bathroom in a number of buildings at the shipyard, including the 260 Building (#3 on the map of the shipyard in evidence as CX 24), and she has also helped clean and remove debris from the #4 area (i.e., graving dock No. 3) in preparation for the launching of a submarine, or for family day or when visiting dignitaries come to the shipyard. While she has not worked in the machine shop, she has used the ladies' room in that building (#19), Ms. Latina remarking that each of the bath rooms has two large rooms, one a sort of powder room or lunch room and the other containing the sinks and stalls. She often would hear Claimant washing his hands in the ladies' room and he would immediately leave if he heard a lady approaching to use the bathroom. According to Ms. Latina, Claimant would "panic" if a woman entered the room, he would look embarrassed even though he was assured that this was no problem. However, one woman did complain and a sign was put on the door announcing that henceforth that room would be reserved exclusively for women. She has gone into the supply room for cleaning materials needed to clean the bathrooms. According to Ms. Latina, she has two breaks per day, one at about 9 AM and the other at about 2 PM, each lasting about ten (10) minutes. Those break times are not mandatory and she believes that she could take her break earlier or later than 9 AM. She has known Claimant for about twelve (12) years and he is a goad worker, just like the others in the maintenance department. While he seemed to get along with others, he usually kept to himself and seemed timid; she never knew that Claimant had any problems prior to December 13, 1996. (TR 40-49)

Ms. Bessie Ellis has worked in maintenance at the shipyard since 1988, the first six years as an employee of a subcontractor performing maintenance work and the last four years as an employee of the Employer. Ms. Ellis first met Claimant sometime in 1991 and she and Claimant did the bathrooms in the machine shop, Mr. Ellis cleaning the ladies' room and Claimant doing the men's room. She never saw Claimant hiding, goofing off or shirking his duties, Ms. Ellis remarking that he was always carrying his gray bucket and his cleaning supplies wherever he went. She also heard Claimant in the ladies' room washing his hands and he would immediately leave whenever he heard any woman approaching the room. She categorically stated that Claimant's presence there was no problem for her. She never heard any of the bosses or supervisors say anything negative about the Claimant whose greetings to her were usually a simple "hello" as he was a man of few words. She also frequently went to the supply room to get her cleaning material, just as the maintenance workers on the other shifts would do. However, she would not let the door close on her and she would prop open the door because it would stick sometimes and she would have to shake the door open. She also agreed that machinists could go

into the supply room. She never saw magazines in that room, never saw anyone in the loft area, never saw Claimant in the storage room and she never heard that the door could somehow lock from the inside. When Ms. Ellis advised her boss that she had been subpoenaed to testify at the hearing, she was then called to the Legal Department and she answered in the negative when asked if she had seen Claimant engaged in sexual activity behind that closed door. (TR 49-58)

Ms. Sandy Gray has worked as a laborer in the Maintenance Department since 1981 and she has worked with Claimant numerous times cleaning the bathrooms all over the shipyard, including the wet docks. She also has heard Claimant washing his hands in the ladies' room whenever she went there to clean that bathroom; she could hear the water running and Claimant, appearing flushed and nervous, would immediately leave. She did not go to the storage room for supplies but she would instead go to inspect the conditions at the ladies' room and her female co-worker would go to the supply room. She has not heard any complaints about the Claimant except for that one woman who complained about Claimant's use of the ladies' room whereupon the new sign was put on the door. When she told her boss that she had been subpoenaed to testify at the hearing, she was then called to the Legal Department and she answered in the negative when asked if she had ever seen Claimant engage in any sexual activity. Attorney Greiner was one of those attorneys at the Legal Department that day. (TR 58-65)

As already noted, Claimant testified that he has worked as a laborer in the Maintenance Department all over the shipyard, including the floating barge for two years from 1981 to 1983, in the electricians' office area (to the left of #19 on CX 24), from August of 1992 to March of 1995, he worked outside the carpenter's barge on the docks (#4 on CX 24, that area where all of the various trades were building components of the submarine right over the Thames River) and in the 260 Building (#3) where the submarines itself is fabricated. Claimant has even gone under the submarine--resting on building blocks--to remove and clean out debris such as so-called "black beauty," *i.e.*, the residuals used by the painters to do their sandblasting, Claimant remarking that the submarine cannot be built safely and efficiently if he and his co-workers did not perform their assigned duties. In fact, if the maintenance laborers failed to perform their duties, the work areas would be "a mess" and would constitute a fire hazard. In March of 1995 he was assigned to clean the bathrooms on the YTT barge and on the docks (#39 on CX 24) and he continued to clean the bathrooms in the machine shop until his last day of work on December 13, 1996. (TR 80-87)

This closed record conclusively established that Claimant sustained orthopedic injuries as a result of his fall on December 13, 1996, that the Employer had timely notice thereof and timely controverted Claimant's entitlement to benefits on the grounds that he is not a maritime employee because of the nature of his work at the shipyard, the Employer essentially arguing that Claimant's "support services" do not satisfy the jurisdictional requirements of the Act. That issue has already been discussed above. The Employer also submits that Claimant's fall did not arise out of and in the course of his employment, an issue I shall now resolve.

John L. "Jack" Elkins, in charge of the Employer's Investigations, testified that he was summoned to the accident scene on December 13, 1996, that he was off-site and arrived there within twenty (20) minutes, that he immediately inspected the storage room, saw foot-prints on the shelves and climbed up into the loft area, that he found a television set there, saw numerous trash bags, several porno magazines, rubber gloves, as well as 3"-4" thick piece of padding and a cushion propped up like a pillow. Mr. Elkins concluded that Claimant had been using the loft as his own "nap" area based on the condition of the door and the observations of a machinist, Mr. Burton Jernstrom, who saw Claimant enter the storage room, immediately ascend to the loft and disappear for thirty (30) minutes or so before the accident. Mr. Elkins took pictures of the scene (RX 20 - RX 23) and he talked to a number of other individuals about the accident. (TR 136-149)

Roland Bourdon was the person who encountered Claimant on December 13, 1996, between 8:30 - 9:00 AM; "rolling on the ground." The "young person" said he could not "feel his legs." Mr. Bourdon called for others to summon an ambulance and he returned to Claimant to comfort him. The Claimant said, "He fell down the machine shop stairs, walked to where he was and collapsed." (SIC) Mr. Bourdon doubted the fall down the stairs and, after talking to Burton R. Jernstrom, a machinist, he went to the Safety Engineering Department and told them what happened. (CX 1)

Mr. Jernstrom has stated that he saw Claimant enter the storage room at 8 AM, on Friday December 13, 1996, and immediately close the door and ascend onto a platform in the supply room or the so-called mezzanine or loft area. According to Mr. Jernstrom, Claimant two weeks earlier had placed cardboard on the window but "the top portion of the window was still clear" and he was able to witness the activity by Claimant. Forty-five (45) minutes or so later Mr. Jernstrom encountered Mr. Bourdon in the walkway next to the supply room and, after a few moments of conversation, both realized that the Claimant was the "young person . . . rolling on the ground."

Additional pictures of the accident scene are in evidence as part of CX 1 at 9. The loft can be seen above the lockers on the next four photographs, the last two showing, according to the Employer, the bedding used by Claimant for his unauthorized breaks or naps.

The parties deposed Ralph H. Perry on December 11, 1998 (CX 25) and Mr. Perry, who has worked at the Employer's shipyard in the maintenance department for twenty-nine (29) years and who has been a member of laborers' local 364 for those years, and is currently vice president of the local and a union steward, testified that Claimant, as a cleaner or a custodian "would work in the machine shop ... in the pipe shop" and in the "tin shop" as needed. These shops are located on the docks and Claimant would also work in the office buildings on the docks, such as the 260 and 263 buildings. These bathrooms are used by all the trades working in those areas and "Big Bertha is on the back side of the machine shop," identified as #19 on the map of the shipyard. (CX 24) Cleaners from the laborers' union would also clean the areas on the YTT barge where the carpenters used to store their tools in lockers, and there were also offices where, for example, files were maintained for those "working on a certain piping section." The barges also generated steam which was supplied to the boats in the graving dock in order to test the various systems on board the boat. (CX 25 at 3-11)

Cleaners played an essential part in the launching of vessels because the area marked #28 had to be thoroughly cleaned and swept free of debris, food, sandblasting grit, etc., because "at launch time everything gets cleaned," Mr. Perry remarking that "you can eat off the place by the time we're through cleaning it." Such cleanliness is "absolutely" important to the United States Navy and its rigid specifications, especially when the President, the First Lady or other visiting dignitaries are present at the shipyard to launch the newest nuclear-powered submarine as part of this country's military might. As part of the new launching method, the cleaners must "sweep in between the tracks" to facilitate the launching process. With reference to work in the machine shop where torpedo tubes are made, and where several trades perform their essential duties in the construction of components to be installed on the boats, Mr. Perry admitted that the Employer builds the best submarines in the world and that the laborers are a necessary and important part of the submarine building process. According to Mr. Perry, the failure of a cleaner to perform assigned duties properly, *i.e.*, removal of debris, paper, etc., might result in a conflagration caused by a welder's spark or a burner's torch; thus, the cleaner's duty is to remove any and all safety hazards. (CX 25 at 12-17)

Mr. Perry arrived at the accident scene after Claimant had been taken away by ambulance. The safety department, other union representatives, IRD and the "curious" were already at the scene. They then went into the supply room, **i.e.**, Claimant's "assigned area where he had his cleaning tools and his lunch and his locker," Mr. Perry agreeing that that was Claimant's "assigned area" and was a proper place for him to be, if he entered that room as part of his employment duties. Charlie Ballato and Mr. Perry climbed a ladder to reach the loft but neither crawled into that area. Mr. Perry saw "a TV to the side with a couple of inches of dust on it. It wasn't connected" and there was no electrical outlet there to be used for a connection." Two days later Mr. Perry returned to the supply room and he saw the window in the loft, an area he described as "like a little cove. It looked like somebody had made a bed. There were some rubber gloves, some toilet paper. And it was just trashed. It was dusty." Mr. Perry did not know who had made the bed because "anybody could have made that bed ... (b)ecause you've got other shifts in that Yard. Mr. Perry has never seen Claimant in that loft area and he is not aware of any disciplinary proceedings brought against the Claimant as long as he (Mr. Perry) has been at the shipyard. (CX 25 at 17-21)

Disciplinary action would have been taken against anyone who was caught sitting down or loitering in the supply before lunch with the door closed but he could properly go in that room to get any of the supplies he needed. He could eat his lunch in there at lunch time. Mr. Perry did learn "that supposedly the door was locked and he couldn't get out" and Mr. Perry had no prior knowledge that there had been any problems with the room or the door. Claimant was a good worker and Mr. Perry is not aware of any disciplinary action against Claimant. Mr. Perry has "been in most of these bathrooms and they have plenty of hot water." Moreover, overtime work is offered equally to all of the workers and "there's overtime for everybody" during a launch. In fact, at the time of his deposition, Mr. Perry stated that the **U.S.S. Connecticut** was being launched that day. (CX 25 at 21-33)

The parties also deposed Peter I. Baker on December 11, 1998 (CX 26) and Mr. Baker, who has worked at the Employer's shipyard for fifteen (15) years and who has served as business manager for the local affiliate of the Laborers Union, which also includes cleaners or sweepers, testified that while cleaners or sweepers are not involved in the "hands-on production work" of building the ships, they are "a support service" and assist the trades engaged in shipbuilding because, according to Mr. Baker, "they keep the place clean." The performance of their duties "improves the overall safety conditions in the shipyard," "reduces the chances of fire," and "when the place isn't clean, we get overrun with rodents

and bugs," Mr. Baker concluding that the Employer cannot safely and efficiently build a submarine without people cleaning up." In fact, when the Employer "reduced the janitorial staffing substantially ... we were overrun with the vermin because the trash just became knee deep ... (a)nd without the cleaners being there the place is just in disarray," Mr. Baker further remarking, "We've had numerous incidents of fires just because of the debris that's been left behind ... and it just takes one cigarette butt thrown into a pile of trash." Moreover, while it is "not likely that a submarine with (SIC) burn because of what it is and how it's made," "the components and the material that go into a submarine will burn. And all it takes is a very small fire to do millions of dollars in damage." (CX 26 at 3-6)

Mr. Baker heard that Claimant had been involved in an accident and he asked Mr. Perry to look into the situation. Claimant was suspended by IRD pending the investigation, which by union contract must be completed within five days. Mr. Baker attended Claimant's hearing, at which time the company's "basic charge was that he was abusing company time," that he "was not working when he should have been working," that he "was in an area that was questionable" and "the whole incident of him falling or jumping or whatever ... was improper conduct." If Claimant had been discharged, Mr. Baker was prepared to file a union grievance, in accordance with the various procedures available in the union contract. However, the Employer offered Claimant the Opportunity to either resign voluntarily or be fired, and "he chose to quit." According to Mr. Baker, if Claimant had not voluntarily quit, the matter would have gone to arbitration and it would have been resolved and settled by the parties "in lieu of arbitration." (CX 26 at 6-9)

Mr. Baker went to the supply room on a couple of occasions after December 13, 1996, looked at some pictures, reviewed the statements of various individuals and also spoke to Claimant. According to Mr. Baker, "Matt is absolutely credible" and he is suspicious about the machinist witness who allegedly saw Claimant climb into the loft area because "the machinist stated that he had been on the lookout for Matt. It makes me suspicious that he was on the lookout for somebody who was just going in there and doing his job. Why the machinist had not gone to Matt's supervisor if there had been a problem - I'm suspicious of him for several reasons. And he was also quite a distance away with a partially ... obstructed view of the area that Matt was in." (CX 26 at 9-13)

The parties also deposed Burton Jernstrom (RX 18) and Mr. Jernstrom, whose December 16, 1996 written statement is in evidence as Deposition Exhibit 1, testified that he has worked at the shipyard for thirty-two (32) years and now works in R&D at the machine shop, that on December 13, 1996 he was "working ... at the

great big do-all saw" on the second floor, balcony, west side, that he had been observing Claimant's activities because a now retired woman had "complained to (him) that she had gone several times into the ladies bathroom and (Claimant) was in the bathroom, in the ladies bathroom. And he really had no business there because he can't clean ladies bathrooms. He cleaned the men's bathrooms. So (he) started to watch (Claimant) because ... it was rather unusual, strange for some man to be in the ladies bathroom." (RX 18 at 2-6)

On December 13, 1996 Mr. Jernstrom saw Claimant "coming from the machine shop portion to the block of offices in a real rapid rate of walking" and he "saw (Claimant) go into the room and then just a few seconds ... (later) saw him climb up on top." According to Mr. Jernstrom, the flat level part is "the ceiling of the ladies bathroom," "a type of loft" where "they had stuff stored up there including a TV that didn't work," a television set that "had (been) taken out of the office there of the nuclear inspector's office." Mr. Jernstrom "witnessed (Claimant) climbing up there ... almost right away "after entering the room." He "kept watching because (he) thought maybe (Claimant would) come out and go in the ladies room." According to Mr. Jernstrom, Claimant was "not a kind of person you could get friendly with" and although he saw Claimant climb up into the loft, he did not see him climb down into the room and he "absolutely" would have been able to see Claimant if he were locked in the room and could not get out of that room. The machine shop is a noisy environment and Mr. Jernstrom does not believe that he would have been able to hear Claimant if the window and the door were closed. (RX 18 at 6-11)

Since the December 13, 1996 incident, there have been no changes made to the room or the door other than the cardboard in the window had been taken down by the investigators. Mr. Jernstrom "watched him (?) put (the cardboard) there" on the window "about a week or two weeks before the incident." It was appropriate for Claimant to go into the supply room on December 13, 1996 because "it looked like (he had) a plastic bag in one hand and a broom in the other or a mop or something." About ten to twenty minutes after he saw Claimant go into that room a person came up to Mr. Jernstrom and attempted to locate the room out of which Claimant exited the building. According to Mr. Jernstrom, he thought "that (Claimant) was trying to look into the ladies room by reaching out the window" as "the building is right over the ladies room." Only that one window was covered by cardboard. (RX 18 at 11-19)

The parties also deposed Michael Street (RX 19) and Mr. Street, who has worked at the shipyard for fifteen (15) years and who had been Claimant's supervisor for at least two (2) years prior to the December 13, 1996 incident, testified that Department 505 is the maintenance department, that he supervises "three distinct

trades," i.e., "the laborers who take care of the janitorial services," "the painters who take care of painting within the shipyard," but not on the boats, and "construction mechanics who do heavy equipment, repairing pipes, digging holes" and that Claimant "did the rest room cleaning ... (in) probably about six or seven buildings ... throughout the shipyard." He was assigned only to clean the men's restrooms and his "schedule did not call (him) to clean any offices" or to clean up or remove debris from around machinery in the production areas. According to Mr. Street, Claimant "would make sure they were all stocked with tissue and hand towels and soap, make sure the floors were clean and the urinals and the toilets (were) clean. Then when he was all done (cleaning), he came out and the floor was washed." Cleaning those men's rooms in those six buildings was a full-time job as "a thousand people would go through there during a period of a day." (RX 19 at 3-6)

Mr. Street was not aware of the existence of the loft area or alcove over the ladies room on the second floor of the machine shop building until after the December 13, 1996 incident, Mr. Street remarking that he "was at school ... when this happened" and "they called (him) back from school, and (he) went over and saw this room" in question. He did not even know that the room was used as an upstairs supply depot for cleaning supplies because he "always thought the south end men's room was used as a supply area." Mr. Street who has not returned to that room since December 13, 1996 was notified of the incident "a little bit after eight o'clock" in the morning. According to Mr. Street, it would not have been appropriate for the Claimant or any employee to take his morning break "because he's just getting started at that time" and because "(t)here's an unwritten law that nine o'clock is so-called break time." Mr. Street had once in the past given Claimant a "reprimand ... on his job performance" but he could not recall reprimanding Claimant for inappropriate breaks. (RX 19 at 7-10)

According to Mr. Street, a break by an employer at the inappropriate time is an "abuse of company time" and would result in "a warning slip for the first" offense. A repeat violation would result in a day or two suspension and he would not have been terminated outright "unless he was caught sleeping" on the job. While Mr. Street was Claimant's "direct, immediate supervisor," any supervisor at the shipyard has the right to address with an employee any performance problem or violation of company rules. (RX 19 at 10-11)

When Mr. Street was summoned to the machine shop after the December 13, 1996 incident, Mr. Street's general foreman, Al Smith, and others, including security, wanted to know about Claimant's

work schedule, where he was supposed to be, etc. Mr. Street then went to the room but he "never climbed to the top of the loft." He was shown the room and the window from which Claimant exited the building. Mr. Street goes by that room "once a month" but, as far as he knew, that room was not being used by the cleaning department as a storage area. Mr. Street "sent someone in there to clean up that room," as well as the loft area. He "believe(d) everything that was up there was probably thrown away, unless security ... took material from the loft. Anything else ... was thrown away." Apparently security had already completed their investigation "by the time that we finally went there and cleaned it up." (RX 19 at 11-13)

According to Mr. Street, Claimant could be described as "a little bit hyper, but ... easy to get along with," one who was always hurrying about and was generally the nervous type and who "wanted to hurry everything up," thereby occasionally "leav(ing) a bathroom half cleaned. Sometimes not stocked," etc. Claimant showed up for work on time and had a good attendance record. Any supervisor who issued a warning or reprimand to Claimant would have also told Mr. Street "because (he) is his immediate supervisor." Security handled the December 13, 1996 and Mr. Street did not know the exact personnel action taken although he concluded, Claimant "was either severed or asked to be severed because he's no longer employed at Electric Boat." (RX 19 at 14-17)

The parties deposed John Elkins on October 26, 1998 (RX 17) and Mr. Elkins, who began at the Employer's shipyard as a security officer in 1983 and who has 'progressed up to senior investigator," testified that in his capacity he is "responsible for any violation of company rules and regulations, major medical incidents, things of that nature," that Claimant's December 13, 1996 incident constituted "a major medical incident" and that he "was notified (of the event) and responded." Mr. Elkins went to "the area where (Claimant) had been found outside of the machine shop on the east side of the building" and he saw no evidence on the ground that anything had happened as Claimant had already been taken to L&M by the paramedics, although "there were some fire department personnel still at the scene" and they "told (Mr Elkins) that that was where he was found." According to these personnel, Claimant "had told them that he had fallen down a set of stairs, exited the building and walked that far before he collapsed." (RX 17 at 2-5)

Mr. Elkins went inside the building to inspect the South Stairwell identified by the fire department personnel and he encountered Roland Bourdon, Claimant's supervisor, who advised Mr. Elkins "that this guy had not fallen down the stairs as indicated, but rather out of a second floor window," Mr. Bourdon remarking that his statement was based on the fact that he saw Claimant

"falling." Mr. Bourdon's statement is deposition exhibit 1 and Burton Jernstrom, who observed Claimant going into the supply room, also provided a statement to Mr. Elkins. He then went to the room and used "yellow tape" to seal off the room and he had maintenance "actually change the lock on the door because at the time there were a lot of keys out for that office from the maintenance personnel." (RX 17 at 5-8)

Mr. Elkins was unable to locate any worker or machinist who had seen or heard Claimant fall down those twenty-five steps as he had alleged. He then went to that supply room and climbed into "an alcove in this maintenance room" and he noticed "footprints on top of the locker, which told (him) that someone else had been up there." After Mr. Elkins "got up onto that level area," he "noticed that there was a makeshift bed ... in an alcove directly adjacent to the window he had come out of." Mr. Elkins also noticed some "(g)arbage bags, pronography (SIC) magazines, toilet paper and a television" which was unplugged. The magazines "were lying on the ground in close proximity to the bed." The window was "not a typical window that slides up and down" but "actually half tips into the building and half tips out of the building" so that "you can never open the whole window" and "so there would not be a possibility of anyone being able to roll out of it," and a person "would have to consciously go out of the window." Mr. Elkins also took photographs of the scene and he described those photographs in graphic terms. (RX 17 at 8-16)

Mr. Elkins was the first person to go into the loft following the incident and he is certain that he saw one set of footprints on top of the locker and while there was much dust and debris in the alcove or loft, he did testify "that the bed was not dusty," something that he "specifically checked," leading him "to believe that someone had been using it recently." He could not recall whether the magazines were open or closed, although he did not believe they were covered with dust. "After (Mr. Elkins) had finished (his) investigation and drew (his) conclusions, maintenance went up and cleaned that entire area up. As far as (he) knows everything got thrown away." Mr. Elkins testified further that the door to the room "opened effortlessly" and could not be secured because of years of abuse. (RX 17 at 16-21)

Mr. Elkins was shown an article in the **The New London Day** on December 19, 1996 and he described the article as "totally false." (Deposition Exhibit 7) Mr. Elkins was then asked to give further testimony about the photographs he took at the scene. Mr. Elkins later learned that the television set "had been reported stolen sometime earlier." (RX 17 at 21-30)

In his excellent post-hearing brief (CX 28), Claimant submits that his December 13, 1996 jump and fall from the ledge arose out of and in the course of his employment for the following reasons:

"To establish entitlement to compensation under the Act, the Claimant must allege a causal relationship between an injury and work conditions or an accident and show the existence of medical impairment or 'injury.' See **U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP**, 455 U.S. 608, 102 S. Ct. 1312 (1982); **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981). An injury is causally related to the employment if it arises out of the employment and in the course of the employment. The requirement that the injury arise out of the employment refers to the cause of the injury. An injury occurs in the course of the employment if it occurs within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. See **Mulvaney v. Bethlehem Steel Corp.**, 14 BRBS 593, 595 (1981).

"Once the Claimant had shown an injury and an accident or conditions at work that could have caused the injury, a presumption exists under § 20 that the Claimant's injury arose out of and in the course of his employment with employer. That section provides in pertinent part:

In any proceedings for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary --

(a) That the claim comes within the provisions of this Act.

\* \* \*

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself . .

33 U.S.C. § 920.

"To invoke the § 20 presumption, the Claimant must establish a **prima facie** case that he suffered an injury, and that an accident occurred or conditions existed at the employment which could have caused that injury. See **Kalaita v. Triple A Machine Shop**, 13 BRBS 326 (1981). Once the § 20 presumption is invoked, the burden shifts to the Employer to rebut the presumption with substantial and specific evidence that the Claimant's condition was not caused or aggravated by his employment. See **Sinclair v. United Food &**

**Commercial Workers**, 23 BRBS 148 (1989).

"There is no dispute in this case as to the cause of the Claimant's injury – that his injuries were sustained when he jumped from the store room window. The employer disputes that the injury occurred in the course of the employment – as a result of an activity whose purpose was related to the employment as opposed to a deviation from the employment for purely personal reasons. 'An activity is related to the employment if it carries out the employer's purposes or advances [its] interests directly or indirectly.' **Boyd v. Ceres Terminals**, 30 BRBS 218 (1997)(quoting Larson, **The Law of Workmen's Compensation** § 20 (1996)).

"The Claimant provided substantial and uncontradicted evidence that his injury occurred as a result of an activity whose purpose was related to his employment. He testified that he was in the store room to retrieve the supplies he needed to clean the men's room near the machine shop. (Tr at 99) His testimony was supported by two co-workers from his department. Bessy Ellis, who cleans the nearby ladies' room on the same shift, testified that she also stores her cleaning supplies in that room, as do the laborers on the other shifts. **Id.** at 53. Ralph Perry also confirmed that it was appropriate for the Claimant to be in the store room for work purposes. (CX 25 at 22) The Employer did not offer any evidence to rebut this testimony.

"Furthermore, the Employer did not offer any evidence to contradict the Claimant's testimony that he jumped from the window because he could not open the door to the store room. His account was substantiated by the blisters and bleeding on his hands caused by his trying to twist and pull the door knob. The social worker's report from the psychiatric consultation confirms that Matthew had blisters on his hand from trying to open the door. (CX 5) His testimony that he also tried to open the door by kicking it was substantiated by the fact that the bottom of the store room door on the inside was completely splintered. (Tr at 145)

"The Claimant reported to the social worker at L & M Hospital that he had become claustrophobic and panicky when he could not open the store room door. (CX 5) He also told the social worker that he panicked when he could not get out of the store room because he was afraid that he would lose his job if he was found in there because of a prior verbal warning. **Id.** He testified that he thought he could get out of the store room by climbing out the window in the loft area and walking on the ledge to an open window in one of the offices. (Tr at 104) A photograph taken on the date of injury confirms that a window located nearby was open. (RX 22) He also testified that he climbed out of the window and jumped

because he was trying to get back to work. (Tr at 109-10 127)

"The Employer offered no evidence to support the suggestion that the Claimant was in the store room for any reason other than to get his cleaning supplies. While pronographic magazines and a make-shift bed were found in the loft area, the Employer offered no evidence that the Claimant had made the bed or was in there on the date of injury to read the magazines. In fact, the uncontradicted testimony in the record was that numerous people used the store room and pronographic materials are found in other areas on the yard, such as the Big Bertha bathroom facility.

"John Elkins testified that there was a window in the store room that opened onto the balcony. (Tr at 141) The window had wire across the top portion but the lower portion could be opened. When he returned to the store room several days after the accident, the door to the store room was locked. He gained access by opening the window and climbing through the lower portion. (Tr at 142)

"Apparently, this testimony was offered to show that the Claimant had an alternative means of getting out of the store room besides jumping out of the window in the loft area. However, the Claimant testified that he had never opened that window in the past and did not know it would open. (TR at 98) The fact that Claimant might have been able to use a different window to get out of the store room does not mean that using the loft window took his actions outside the course of his employment. He was in the store room so that he could get his cleaning supplies. When he became trapped in there, his only intent was to get out of the store room so that he could return to his cleaning duties. Therefore, since all of these activities were done solely to further the Employer's purposes, his injury occurred in the course of his employment.

"Counsel for the Employer suggested in his opening remarks that perhaps the Claimant was in the store room for personal reasons, possibly to sleep on the make-shift bed.<sup>1</sup> (Tr at 34) However, counsel admitted that he did not know what Claimant was doing in the store room and offered absolutely no evidence supporting the suggestion that he went in there to sleep. Counsel also admitted that there was no evidence that Matthew was trying to commit suicide by jumping from the window ledge. (TR at 36) In fact, the medical records reflect that Claimant did not exhibit any indication of being suicidal in the hospital and his parents, who

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<sup>1</sup>Both the Claimant and Ralph Perry testified that the loft area was filthy and full of trash. Given the Claimant's lifelong obsession with cleanliness, the Employer's suggestion that he might have been sleeping in the trash is simply not credible.

had seen him the day before the accident, confirmed that he was not suicidal. (CX 5) Thus, there is no evidence in the record supporting even a theoretical inference that this episode was an attempt at suicide.

"Notwithstanding the total lack of any evidence in the record to support an inference that the Claimant's injury occurred as a result of his engaging in purely personal pursuits, an inference is not sufficient to rebut the presumption that the injury arose out of and in the course of the employment unless the inference constitutes the kind of evidence that a reasonable mind would accept as adequate to support a conclusion. **See John W. McGrath Corp. v. Hughes**, 264 F.2d 314 (2d Cir.), **cert. denied**, 360 U.S. 931 (1959). "Reliance on hypothetical probabilities or highly equivocal evidence is not substantial and will not rebut the presumption. ... Thus, fact, not speculation, are necessary to rebut the presumption." **Mulvaney, supra**, at 597 (citations omitted).

"In **Mulvaney**, the Claimant injured his arm when it was caught in a planer. The Employer offered evidence that use of the planer had not been authorized for several months prior to the injury. Furthermore, two people testified that there were redwood shavings near the planer on that day and the Employer did not use redwood. From this testimony, the ALJ inferred that the Claimant had no work-related reason to use the planer and thus ruled that the Claimant's injury did not arise in the course of his employment.

"The Board reversed, holding that the Employer's negative evidence did nothing more than create speculation as to why the planer had been turned on and how the Claimant's arm became caught in it:

[S]peculation, or mere hypothetical probabilities, are not sufficient to rebut the presumption. . . . There was no evidence directly controverting the presumption that the injury occurred in the course of Claimant's employment. Indeed, in making his determination, the administrative law judge relied almost entirely on negative evidence, particularly his finding that Claimant's explanation for the manner of the accident was lacking in credibility.

**Mulvaney**, 14 BRBS at 597.

"In this case, the Claimant offered substantial evidence that he was in the store room for purposes related to his employment and that he jumped from the ledge so that he could return to his

cleaning duties. The Employer has offered nothing but speculation and supposition to support its contention that the Claimant was in the store room for any reasons other than work reasons.<sup>2</sup> Therefore, the Employer has not rebutted the presumption that the Claimant's injury arose in the course of his employment.

"Furthermore, even if, as the employer suggests, the Claimant was in the store room on the date of injury for personal reasons, his injury would still have arisen in the course of his employment. In the case of **Durrah v. Washington Metropolitan Area Transit Authority**, 760 F.2d 322, 17 BRBS 96 (CRT) (D.C. Cir. 1985), the Claimant was a security guard who left his post to get a soda. He was injured when he fell going to the employee lounge where the soda machine was located. The court held that the fact that he was not authorized to leave his guard post to go to the employee lounge was irrelevant to the determination of whether the injury arose in the course of his employment:

The lounge and staircase were facilities WMATA expected its employees to use. . . . Employee use of the [soda] machine was an anticipated occurrence in the course of a workday. . . . It is not "necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the 'obligations or conditions' of employment create the 'zone of danger' out of which the injury arose." . . . In short, had Durrah first secured a replacement, his injury would unquestionably have 'take[n] place within the period of the employment, at a place where the employee reasonably may be, and while he [was] engaged in doing something incidental [to the employment]."

\* \* \*

The asserted violation [of company rules] did not place Durrah in the path of new risks not inherent in this employment situation.

**Durrah**, 17 BRBS at 97-8 (citations and footnote omitted).

"In this case, there was uncontradicted testimony that the store room was used by cleaners, including Matthew, to store cleaning equipment and was also used by other people for different

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<sup>2</sup>It is apparent that the employer reacted so aggressively in this case because of some early suspicions which ultimately turned out to be unjustified. This is unfortunate since the Claimant lost a valuable job and the employer lost a long and faithful employee whose only fault was that he walked too fast.

work-related reasons. Therefore, even if Claimant were in there at the time of injury for reasons not related to his employment, his being in the store room at that time did not place him in the path of new risks not inherent in his employment because he used that room at other times for legitimate work reasons. Pursuant to **Durrah**, therefore, the injury would still be compensable under the Act," according to the Claimant's thesis.

As noted above, the Employer has also controverted this claim on the grounds that Claimant's jump from a ledge at the Employer's shipyard was not an incident in the course and scope of his employment. I agree with the Employer for the following reasons:

The claim before me must be denied because the accident in question did not occur in furthering the shipbuilding activities of the Employer, although the accident certainly happened within the time and space of employment as Claimant was "on-the-clock" and as he was injured in an adjoining area at the Employer's shipyard. In this regard, **see Wilson v. W.M.A.T.A.**, 16 BRBS 73 (1984). While Claimant has the benefit of the Section 20(a) presumption that his accident occurred within the scope of his employment, the Employer has offered specific and comprehensive evidence severing the connection between such accident and Claimant's maritime employment. Thus, on that issue, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate all of the evidence in determining whether the accident arose out of and in the course of Claimant's maritime employment.

It is well-settled that the nexus between the employment and the accident may be severed if the employee violates an express prohibition, acts without authorization, acts purely for personal reasons, or has abandoned his employment-related duties and status, and has embarked on a personal mission of his own. **Oliver v. Murry's Steaks**, 17 BRBS 105, 108 (1985).

Although the testimony of the Claimant's actions at the time of his accident is contradictory, certain elements of the credible testimony from the witnesses do stand out, and I find such testimony to be most persuasive.

The Claimant testified that he was in the storage area; he testified that he climbed up to the loft, not just on this day but on the other days. (TR 97) He acknowledged that he was there outside of the traditional "break time." (TR 93) He was in the room for an unusually lengthy time. (TR 124) He had been disciplined previously for leaving early outside of his scheduled work time. (TR 91) He was informally spoken to by his supervisor for taking a break outside of the scheduled break times. (TR 92)

A machinist who worked in the area also testified. (RX 18) On the date of the incident, Mr. Jernstrom was working outside of the stockroom in question. (RX 18 at 4) (He stated that he had been watching the Claimant's activities on behalf of a female co-worker who complained that the Claimant was using the ladies bathroom, which was next to the supply room. (RX 18 at 5, 6)) He watched the Claimant enter the stock room, and the, through a plain glass window to the side of the stock room door, witnessed the Claimant climbing into the loft area. In fact, Mr. Jernstrom, intrigued by the whole scenario, went to the supply room to look in and see if the Claimant was visible; he was not. He did not observe the Claimant come down from the loft or out of the room. While the Claimant testified that he was pounding on the door to get out, Mr. Jernstrom testified that he neither saw nor heard the Claimant pounding the door to get out of the room. (RX 18 at 6, 9, 10)

While the Claimant testified that the door was stuck, other maintenance workers and the supervisors of the maintenance department could not confirm this statement. (TR 54, 62; CX 25 at 22) Indeed, other maintenance workers went in and out of this room on a regular basis without incident. (**Id.**)

Claimant also testified that he was nervous about being in the stock room (TR 108); however, supervisors of the department indicated that, as long as he was there for a legitimate, work-related task, he had no reason to be agitated as he belonged there. (CX 25 at 22) After being in the supply room for 15 to 20 minutes, he than **jumped** out the window to get back to work. (TR 108, 109)

I simply cannot accept Claimant's testimony as to the reasons why he remained in the store room for twenty (20) minutes or so and as to why he found it necessary to jump that twenty (20) feet or so from that ledge once he realized that the ledge was not wide enough to accommodate his work boots. While Claimant had a legitimate reason to enter the store room to obtain the cleaning supplies he needed, it should have taken him no more than five minutes to obtain those supplies. He was in there for at least twenty (20) minutes, leading this Administrative Law Judge to conclude that he was in that room for purely personal reasons, on a so-called frolic of his own, and taking an unauthorized break, to put the entire episode in the light most favorable to the Claimant. However, I will go further and conclude that Claimant was in that room either to view the magazines there or to peek into the adjoining ladies' room, as was articulated by one witness for the Employer.

In any event, after five (5) minutes or so, Claimant was no longer furthering the Employer's shipbuilding operations, and he

was on "a frolic of his own." Claimant knew the situation in which he had placed himself and Claimant, perhaps hearing someone approach the room, climbed out on the ledge and then decided to jump to the ground below to escape detection. Claimant realized that he had a problem with this situation and, rather than telling the truth as to what had happened, told those who had asked him that he fell down twenty-five (25) steps inside that building. That was a deliberate falsehood and Claimant had no reason to utter that unless he knew that he would be reprimanded for that unauthorized break.

I am aware of the Board's recent decision in **Boyd v. Ceres Terminal**, 30 BRBS 218 (1997), wherein the Board affirmed an award of benefits to an employer (a forklift operator) who had left his machine to take a short detour to the company parking lot to assist another employer in starting his automobile, the Board holding that the injury to the employee arose in the course of his employment because the detour was a "minor deviation" from the usual employment and because that good samaritan act furthered that employer's business activities.

In the case at bar, Claimant's rash actions can best be described as a major deviation from his duties as a laborer and in no way furthered the Employer's shipbuilding operations.

While Claimant refers to the Employer's countervailing arguments as mere supposition and speculative, I reject that suggestion of the Claimant, primarily because of the initial falsehoods of Claimant to cover his tracks and also because the Employer's essential thesis is more probative and persuasive, as opposed to Claimant's belated efforts to explain the accident and to extricate himself from the situation in which he now finds himself.

There is absolutely no evidence, and I reject the suggestion, that Claimant attempted to injure himself by a suicidal leap on the day in question. Thus, the provisions of Section 3(c) of the Act are not applicable herein, **i.e.**, "no compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

While a newspaper article suggested that Claimant, because of marital difficulties, perhaps may have been sleeping overnight in the loft (RX 17, Deposition Exhibit 7), Mr. Elkins described the article as "totally false." Thus, I credit the uncontradicted testimony of Mr. Elkins in the absence of any contrary testimony from the Claimant on that issue. Moreover, Claimant testified that

he has his own apartment although he does spend the weekends at his parents' home.

This claim must be denied for the additional reason that Claimant voluntarily and knowingly violated the Employer's rules against unauthorized or premature breaks when he climbed out on the ledge and placed himself **in the path of new risks not inherent in his employment situation.**

The "added peril" or "added risk" doctrine is well-recognized in the field of workers' compensation law and this doctrine implies that an employee removes himself from coverage under a workers' compensation scheme if he performs his task in an unusual or unnecessarily dangerous way. A typical case occurred in Massachusetts. **Hurley's Case**, 240 Mass. 357, 134 N.E. 252 (1922)(compensation denied when worker chose to walk along a high narrow beam instead of the factory floor to access another part of the plant); **Lazarz's Case**, 293 Mass. 538, 200 N.E. 275 (1936)(compensation denied when employee, who was tasked with wiping down the outside of machines and was forbidden to open the gear box, opened the gear box and had his hand enmeshed inside). However, no such case seems to have appeared in Massachusetts since 1936 and the Supreme Judicial Court seemed to modify its position on this point. In **Chapman's Case**, an employee was injured while milling clapboards for a friend. **Chapman's Case**, 321 Mass. 705, 75 N.E.2d 433 (1947). In awarding compensation the Supreme Judicial Court wrote that "the employee at the time of his injury had not embarked upon an enterprise exclusively for his own personal purpose and beyond the ambit of this employment." **Id.** at 436.

Moreover, the "added peril" doctrine has been considered in the following cases: **Cunningham v. Industrial Comm'n**, 78 Ill.2d 256, 399 N.E.2d 1300 (1980)(compensation denied when employee slammed hand against door breaking bones after his wheelbarrow tipped); **Segler v. Industrial Comm'n**, 81 Ill.2d 125, 406 N.E.2d 542 (1980)(compensation denied to employee injured when crossing conveyor belt to place a frozen pot pie in an industrial oven); **Howell Tractor & Equip. Co. v. Industrial Comm'n**, 78 Ill.2d 567, 403 N.E.2d 215 (1980)(compensation denied to a machine repairman who, after meeting with colleagues at a bar to discuss a problem with a machine while traveling on business, lost his leg when returning to his motel while traveling along railroad tracks). The Illinois Supreme Court did award compensation in a later case with facts similar to the case at hand. In **Gerald D. Hines Interests v. Industrial Comm'n**, an employee was injured while attempting to gain access to a locked office by means of an access shaft. **Gerald D.**

**Hines Interests v. Industrial Comm'n**, 191 Ill.App.3d 913, 138 Ill. Dec. 929, 548 N.E.2d 342 (1989). The employee was responsible for making daily adjustments at 5:00 P.M. to a building's heating and air conditioning unit. The employee had previously received poor job evaluations and was concerned about losing his job. On the day he was injured, he received an improved evaluation. When the employee returned to his office at 5:00 P.M. to make the adjustments he discovered that he had locked himself out of the office. The employee said he felt silly and did not want to jeopardize his improved evaluation so he attempted to enter the office through the aforementioned access shaft. The employer sought to deny compensation based on the employee's misconduct. The Illinois Supreme Court affirmed an award of benefits because the employee was engaged in activity in furtherance of his employment.

In view of the foregoing, I reiterate that the claim before me must be denied because Claimant was not engaged in an activity in furtherance of the Employer's shipbuilding operations **AFTER** he had entered and remained in the supply room **FOR MORE THAN FIVE MINUTES** because he was then in there for personal reasons, **i.e.**, to take a nap, watch television, read magazines or just "goof off." Thus, his activities, after five (5) minutes in there, were outside the scope of his employment.

As I find and conclude that Claimant's accident did not arise out of and in the course of his maritime employment, the claim before me shall be and the same hereby is **DENIED**.

However, in the event that reviewing authorities should hold otherwise as a matter of law, I shall make certain additional findings for the future guidance of the parties.

#### **Nature and Extent of Disability**

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movable Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he could not return to work as a laborer between December 14, 1996 and February 26, 1997. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment during that closed period of time. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability during that closed period of time.

#### **Average Weekly Wage**

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence

or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983). Accordingly, this Administrative Law Judge should include the weeks of vacation as time which claimant actually worked in the year preceding his injury. **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136 (1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan, supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone, supra**. Claimant worked for the Employer for the 52 weeks prior to his injury. Claimant submits that his average weekly wage as of December 13, 1996 was \$474.70 (TR 8) and as his wage records

corroborate that wage, I find and conclude that his average weekly wage may reasonably be set at \$474.70. (CX 19)

### **Medical Expenses**

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary

medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, *supra*.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on December 13, 1996 and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

### **Interest**

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v.**

**Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

#### **Section 14(e)**

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to benefits. (RX 3) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

#### **ENTITLEMENT**

Since Claimant did not sustain an injury within the scope of his maritime employment, he is not entitled to additional benefits in this proceeding and his claim for benefits is hereby **DENIED**. Since any disability Claimant experienced during that closed period of time is due to an independent, subsequent and intervening event, severing the chain of causality or connection between such disability and his maritime employment, he is not entitled to benefits in this proceeding and his claim for benefits is hereby **DENIED**.

The rule that all doubts must be resolved in Claimant's favor does not require that this Administrative Law Judge always find for Claimant when there is a dispute or conflict in the testimony. It merely means that, if doubt about the proper resolution of conflicts remains in the Administrative Law Judge's mind, these doubts should be resolved in Claimant's favor. **Hodgson v. Kaiser Steel Corporation**, 11 BRBS 421 (1979). Furthermore, the mere existence of conflicting evidence does not, **ipso facto**, entitle a Claimant to a finding in his favor. **Lobin v. Early-Massman**, 11 BRBS 359 (1979).

While claimant correctly asserts that all doubtful fact questions are to be resolved in favor of the injured employee, the mere presence of conflicting evidence does not require a conclusion that there are doubts which must be resolved in claimant's favor. **See Hislop v. Marine Terminals Corp.**, 14 BRBS 927 (1982). Rather, before applying the "true doubt" rule, the Benefits Review Board has held that this Administrative Law Judge should attempt to evaluate the conflicting evidence. **See Betz v. Arthur Snowden Co.**, 14 BRBS 805 (1981). Moreover, the U.S. Supreme Court has abolished the "true doubt" rule in **Maher Terminals, Inc. v. Director, OWCP**, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994), **aff'g** 992 F.2d 1277, 27 BRBS 1 (CRT)(3d Cir. 1993).

As Claimant has not successfully prosecuted this claim, his attorney is not entitled to a fee award.

#### **ORDER**

It is therefore **ORDERED** that the claim for benefits filed by Matthew A. Newgarden shall be, and the same hereby is **DENIED**.

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**DAVID W. DI NARDI**  
Administrative Law Judge

Dated:

Boston, Massachusetts

DWD:ln